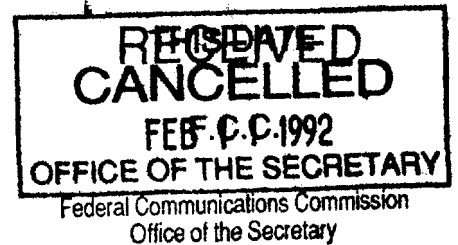


ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



In re:)
)
Amendment of Part 73 of the)
Commission's Rules)
)
To Require Protection for U.S.)
Border-Area Applications and for)
Establishing Notice and Comment)
Procedures Upon Receipt of)
Notifications Pursuant to Treaty)

MM Docket No. _____
RM No. _____

To: Chief, Policy and Rules Division

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PETITION FOR RULE MAKING

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CALIFORNIA

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February 12, 1992

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PETITION FOR RULE MAKING

Introduction and Concise Summary

The University of Southern California, licensee of Station KUSC(FM), Los Angeles, California, which operates on Channel 218B, 91.5 MHz ("KUSC"),¹ by its attorneys and pursuant to Section 1.401 of the Commission's Rules, hereby Petitions the Chief, Policy and Rules Division, to formulate new regulations under Part 73 of the Commission's Rules which would:

- (a) provide protection for acceptable applications filed with the FCC from subsequent notifications or proposals by foreign governments pursuant to treaty which conflict with or adversely affect the grantability of the previously filed applications;
- (b) mandate public notice and comment procedures for affected American licensees, permittees or applicants before acceptance by the FCC of any notification or proposal by a foreign government pursuant to treaty.²

¹ Although KUSC is a noncommercial station, this Petition is intended to apply both to commercial and noncommercial stations and applicants.

² This Rule Making would apply both to international agreements with Canada and Mexico. However, because the facts giving rise to this Petition relate to working procedures and enforcement of the 1972 United States/Mexican Agreement Concerning FM Broadcasting in the 88 to 108 MHz Band (hereafter, the "1972 Agreement"), and because, unfortunately, most problems experienced by U.S. broadcasters pursuant to international agreements seem to occur along our southern border, the 1972 Agreement will be specifically referred to herein.

This Petition is occasioned by KUSC's recent experience, as described in the Background section below. The experience is both sad and sobering.³ In the course of dealing with its own problems, KUSC has learned about numerous other border-area U.S. licensees who have experienced similar difficulties, all resulting from Mexican border-area stations operating in flagrant disregard of the 1972 Agreement.

Grant of this Petition, which seeks only reasonable protection for U.S. broadcasters and applicants, and the fundamental right of notice and comment in case of proposed international actions which directly affect them, will help to assure that henceforth, U.S. operators will not experience illegal foreign broadcasting without an opportunity to protest.

Doubtless, other similarly situated broadcasters will have their own proposals for improving the FCC's administration of international agreements. KUSC welcomes them and hopes that those proposals will be made as additions to this Petition. New rules and policies are needed to protect the interests of American broadcasters in the face of noncomplying foreign operators..

In support whereof, the following is shown.

³ Because of the seriousness of the issues presented, a Petition for Expedited Consideration is being filed simultaneously.

Background

1. KUSC has provided listeners in Greater Los Angeles with quality cultural and fine arts programming for two decades. Despite coverage deficiencies, KUSC has become a community mainstay and one of the nation's most popular noncommercial radio stations.

2. In July 1990, KUSC sought to modify its licensed facilities in order to improve local coverage. KUSC applied for an increase in its effective radiated power and relocation to the Mount Wilson antenna where most Los Angeles stations are sited.^{4 5}

3. KUSC's application did no harm to any present, proposed or potential station in either the U.S. or Mexico. No station would be interfered with or short spaced by the proposal. No new station grant would be precluded. And there would be no adverse impact on the 1972 Agreement with Mexico.⁶

The application was accepted for filing on July 31, 1990. No objections were made. Processing began in the FM Branch and, on June 17, 1991, a lengthy amendment was filed in response to staff questions. The application is ready to be granted.

⁴ The application file number is BPED-900724IC.

⁵ This very substantial application was prepared at considerable expense with the active support of thousands of local residents seeking improvement in KUSC's signal quality.

⁶ Because KUSC's proposal is within 199 miles (320 kilometers) of the U.S./Mexico Border, a showing of compliance with the 1972 Agreement was required.

4. However, despite its border-area status and the preclusive effect later Mexican allotments could have on it, the Bureau's FM Branch failed to notify the Bureau's International Branch of KUSC's pending modification. It appears that there are no guidelines or policies requiring such intra-Bureau notifications. They are made (if at all) strictly on an ad hoc basis.⁷

5. Unbeknownst to KUSC, while its application was being processed by the FM Branch and it was promptly responding to staff requests for more data, sometime in mid-1991 the Mexican Government notified the International Branch pursuant to the 1972 Agreement of its desire to allot a new Tijuana FM on 91.5 MHz -- KUSC's frequency.⁸ The proposed station was short-spaced to KUSC by 23 kilometers and the International Branch rejected it.⁹ KUSC was never informed either about the notification or the Bureau's rejection. Neither of these

⁷ Of course, the application is in the FCC data base and the staff of the International Branch could easily have found it. But no attempt was made to do so.

⁸ Section 0.61(b) of the Rules includes as one of the functions of the Mass Media Bureau administering "U.S. responsibilities under international agreements and treaty obligations pertaining to broadcasting." These functions are handled by the International Branch. However, there are no other rules or published policies describing or defining these responsibilities.

⁹ Article 6C of the 1972 Agreement fixes the minimum required separation between Class B stations on either side of the border at 150 miles or 240 kilometers.

official Commission actions was ever published. See Sections 5(j) and 5(m) of the Communications Act.¹⁰

6. Subsequently, date again unknown, the Mexican Government proffered a new 91.5 MHz Class B Tijuana notification: this time the proposed geographic coordinates were approximately 15 miles south of Tijuana, 240.7 kilometers from KUSC, just clearing the required 240 km B-to-B separation in the 1972 Agreement.¹¹

7. Again the Commission gave no notice of this proposal. KUSC, a co-channel station which would obviously be affected by it, and which was prosecuting an application which conflicts with it, was never informed. Under Article 11A of the Agreement, the U.S. was required to accept or object to the notification within 45 days of presentation. Apparently, since the notification cleared the 1972 Agreement's Class B-to-B separations -- albeit by less than a kilometer and at a dubious

¹⁰ Indeed, this factual recital consists of oral information from various sources.

¹¹ This proposal should not have been taken seriously. The geographic coordinates proposed by Mexico and accepted by the International Branch put the proposed site directly behind C. El Coronel Mountain, which blocks it completely from Tijuana. In order to serve Tijuana from there, the licensee would have to construct a tower nearly 1500' in height just to clear the mountain top! The proposed site is also miles away from available power sources. It is, in short, unusable. As recent events have confirmed, there never was any intention to construct there. This is typical of the disregard with which the Mexican Government views the 1972 Agreement and U.S. broadcasters. The instant Rule Making is aimed at preventing such travesties in the future.

locale -- that was sufficient for the International Branch. On another unknown date, the notification was accepted. Some time later, the new 91.5 MHz Tijuana allocation found its way into the FCC data base.

8. The effect of this secret action on KUSC's present operations and its proposed modification has been devastating. Despite a KUSC protest in December 1991 (after it first learned of the FCC action) that a new co-channel station in Tijuana would destructively interfere with KUSC's authorized service, no attempt to stop it was made by the agency. Instead, the stated FCC position was that even if the 1972 Agreement was amended by mistake, it was nonetheless amended and KUSC had no right to complain.

9. In late January 1992 and without warning, a new Tijuana station commenced operations 91.5 MHz, not at the authorized site but in Tijuana itself. The Station, XHTIM, is in clear violation of the 1972 Agreement, broadcasting as a Class B short-spaced to KUSC by 23 kilometers without U.S. consent. The Mexican Government has disdained this position: after KUSC filed a formal complaint on February 3, protesting the action, which was presented to the Mexican authorities, XHTIM has increased its power.¹²

¹² XHTIM had previously been broadcasting illegally on 103.3 MHz. After a year and a half of complaints from San Diego Station KJQY(FM) of destructive interference, XHTIM has shifted to 91.5 MHz, where it continues to operate illegally and destructively, this time with KUSC as the victim.

10. XHTIM's interference to KUSC is significant. At certain times the XHTIM signal "covers" KUSC's even outside the KUSC studios in Los Angeles! Although the FCC's San Diego Field Office has advised its Mexican counterpart that XHTIM is violating the 1972 Agreement, Mexican authorities argue that since the FCC has accepted XHTIM as a Class B Tijuana station, it can now operate with those facilities from wherever it chooses.

11. This should not have happened. If the Commission had advised KUSC of the notification when it was made, and offered KUSC the opportunity to comment before acceptance, this parade of horrors would never have occurred.

12. The U.S. acceptance of the Tijuana notification also has a potentially adverse effect on KUSC's longstanding modification request. By not considering the modification before accepting Mexico's proposal, the Bureau has effectively aided and abetted in creating a short-spacing which was not there previously. That is unfair to the people of Los Angeles who participated in the submission of the application, as well as a disservice to American broadcasters whose interests the FCC is supposed to protect. It is also contrary to the way in which the agency treats domestic applications; see Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments, MM Docket No. 91-348, NPRM: 12/16/91.

13. Had the International Branch known about KUSC's modification, the Tijuana allocation would not have been accepted. It is wrong for an otherwise acceptable application to be blind-sided because of an internal communications breakdown; the Bureau would never tolerate such unfairness from outside the agency. Grant of this Petition will help ensure that this kind of foul-up never happens again.

Specific Requests

14. If the preceding recital reads like one of Kafka's horror stories,¹³ consider that, virtually alone among FCC decision making procedures, actions impacting on border-area stations and applicants are not subject to public notice. Nor are there specific policies or standards within the Bureau to inform those making decisions pursuant to international agreements about matters of importance. Grant of this Petition will help improve the internal communications flow and protect U.S. broadcasters from future mistakes of this kind.

15. First Proposal: Intra-Bureau Application Notification Procedures. As mentioned, there is no process by which the International Branch is advised by other branches of pending applications which may be detrimentally affected by

¹³ If this were a movie, it could properly be titled "Nightmare on 'M' Street"!

foreign notifications. There should be. KUSC proposes that regulations be propounded creating such an internal notification process.

16. KUSC proposes that, from the time a border-area application is accepted for filing until it is either granted or denied, the application be formally protected from subsequent inter-governmental actions which could adversely affect it. New regulations should specify that, simultaneously with the acceptance for filing of a border-area application, an advisement is also sent to the International Branch. The advisement would identify the application, the community, channel and geographic coordinates, and the purpose of the filing. From the time of acceptance until the application is finally disposed of, no later international action which conflicts with or adversely affects it could be accepted. If the application is eventually denied, conflicting notifications could then be entertained.

17. Such regulations would serve the public interest by protecting U.S. applicants without significant impact to the staff's workload. There are only a relatively few border-area applications filed and sending an fill-in form advisement from the processing branch to the International Branch is scarcely an undue burden. Even if it were, the FCC's prime purpose is to protect American communications interests, not those of foreign nations. While international comity may be desirable,

it should not be achieved by disregarding the rights of U.S. broadcasters.¹⁴ The requested rule making, which is both fair and consistent with domestic FCC policy in honoring a "first come, first served" approach, will assure that pre-existing U.S. applications are not mooted by foreign proposals made months or years afterwards.

18. Second Proposal: Notice and Comment. Our government must work in the sunshine. The right to public notice of potentially adverse actions is embedded in our system of government: in the U.S. Constitution, and in the Administrative Procedure Act and in Communications Act, just to name applicable statutes. Under the APA, no domestic rule making can occur without public notice and the right of affected parties to comment. 5 U.S.C. Sec. 553.¹⁵

19. The Communications Act is replete with requirements for public notice before the agency can act. Section 5 of the Act mandates, inter alia, that "[e]very vote and official act of the Commission shall be entered of record," that all investigative reports "be entered of record, and a

¹⁴ Especially given the history of flagrant disregard by Mexican authorities for U.S. stations. Many American licensees who operate near the border have their own horror stories which parallel KUSC's. There is no reason why U.S. broadcasters should be held to strict compliance with the 1972 Agreement when their Mexican counterparts are given carte blanche to short-space and interfere with U.S. stations and the Mexican Government turns a deaf ear to these violations.

¹⁵ The APA includes the same requirement for adjudications. 5 U.S.C. Sec. 554.

copy thereof . . . furnished to the party who may have complained, and to any common carrier or licensee that may have been complained of," and that the agency "shall provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use." Section 303(f) requires that changes in frequencies, authorized power or times of station operation not be made without licensee consent or a public hearing. Section 309(b) broadly dictates that no broadcast license or application can be granted unless there has been public notice of acceptance for filing and grant. See also, e.g., Communications Act, Sections 307, 316..

20. With respect to broadcast regulation, it may well be that the only decisions made by the Bureau pursuant to delegated authority as to which public notice is not given are those relating to notifications under international agreements. There is no logical reason why, in this one area, affected parties should be denied notice of governmental actions that can threaten, or even destroy their operations. How can secret actions which result in destructive interference to U.S. broadcasters possibly be justified because they are made under an international agreement, when such actions would be intolerable under any federal statute! Surely on the border as well as anywhere else in this country, when the government acts, the public has a right to know.

21. Article 11A of the U.S./Mexico Agreement gives either party 45 days to object to a new station notification. That time period is sufficient for inclusion of notice and comment procedures like those in Section 309 of the Communications Act. KUSC therefore proposes that rules be promulgated requiring that, immediately after receipt of a notification pursuant to treaty, the Commission issue a public notice of the notification, identify the community, class of station, channel and proposed geographic coordinates, and allow potentially affected parties 30 days to comment on or protest the notification. Filers would have to establish their status as affected parties in a showing similar to that required by Section 309(d)(1). Submission of such comments or protests would require the International Branch to reject or hold in abeyance the foreign notification while the filing is considered. The 30-day filing requirement would still leave approximately two weeks in the 45-day notification window for timely response to the notification. In the event the protest is rejected, the notification could be resubmitted or reconsidered.

22. Requiring notice and comment on foreign notifications will prevent future communications breakdowns like that which has affected KUSC. They will also assist the Bureau by shifting to affected licensees or applicants some of the responsibility for ensuring that decisions are made based

on full and accurate information. A border-area applicant (like KUSC) could not complain about an international action if it had notice of the action contemplated and an opportunity to be heard before it was enacted.

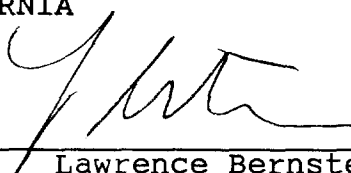
Conclusion

For these reasons, KUSC requests that Part 73 of the Rules be amended and regulations expeditiously be propounded requiring intra-Bureau notification of and protection for U.S. border-area applications, and establishing notice and comment procedures for notifications submitted pursuant to international agreements.

Respectfully submitted,

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February 12, 1992

CERTIFICATE OF SERVICE

I hereby certify that I have, this 12th day of February, 1992, served the foregoing "Petition for Rule Making" upon the following persons by hand delivery:

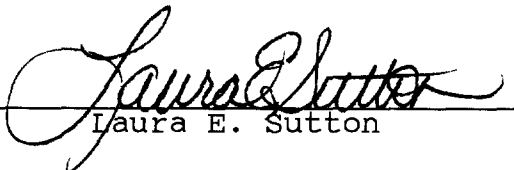
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